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Federal Communications Commission

DA 99-919

DISPATCHED BY

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
)
Amendment of Section 73.202(b)) MM Docket No. 99-170
Table of Allotments,) RM-9545
FM Broadcast Stations.)
(Oceanside and Encinitas, California))

NOTICE OF PROPOSED RULE MAKING

Adopted: May 5, 1999

Released: May 14, 1999

Comment Date: July 6, 1999

Reply Comment Date: July 21, 1999

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Compass Radio of San Diego, Inc. ("petitioner"), licensee of Station KXST(FM), Channel 271B, Oceanside, California, requesting the reallocation of Channel 271B from Oceanside to Encinitas, California, as that community's first local aural transmission service, and modification of its authorization accordingly. Petitioner stated its intention to apply for Channel 271B if it is reallocated to Encinitas.

2. Petitioner's request is filed pursuant to the provisions of Section 1.420(i) of the Commission's Rules which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. See Modification of FM and TV Authorizations to Specify a New Community of License ("Change of Community R&O"), 4 FCC Rcd 4870 (1989), recon. granted in part ("Change of Community MO&O"), 5 FCC Rcd 7094 (1990). In support of the proposal, petitioner states that the requested reallocation of Channel 271B to Encinitas is mutually exclusive with the current authorization of Station KXST(FM) at Oceanside, as no change in transmitter site is requested.

3. Further, petitioner advises that Encinitas, known as the Flower Capital of the World, is an incorporated community containing a population of 55,386.¹ The community has a local government administered by a five-member City Council and a city manager. Additionally, Encinitas has its own fire, water and sewer departments, as well as hospitals, library services, nine elementary public schools, three public high schools, numerous private schools, and a

¹Population figure was taken from the 1990 U.S. Census. Petitioner reports that according to a study performed by SANDAG/Sourcepoint, Encinitas' population increased to 57,574 persons (+4%) as of January 1, 1997.

campus for a nearby college. Moreover, petitioner reports that Encinitas has at least 25 churches, numerous commercial establishments, and community organizations which include the YMCA, Boys and Girls Club, the Rancho Coastal Humane Society, a visitors center, senior center and a community resource center. Ten public beaches, a botanical garden and parks are also located in Encinitas.

4. Petitioner states that Station KXST(FM), is a pre-1964 grandfathered authorization. While its proposal is shortspaced to Station KGB-FM, Channel 268B, San Diego, California, as well as to Station KSCA(FM), Channel 270B, Glendale, California, each of those facilities were also authorized prior to 1964. Therefore, petitioner asserts that as its proposal does not involve a transmitter site change, the existing grandfathered short spacings are not an obstacle to the proposed reallocation of Channel 271B to Encinitas.

5. In further support of its proposal petitioner states that adoption of its proposal would result in a preferential arrangement of allotments consistent with the Revision of FM Assignment Policies and Procedures, 90 FCC 2d 88 (1992),² as the reallocation would provide a first local aural transmission service to Encinitas (priority three) whereas Oceanside will continue to receive local service provided by full-time, non-commercial AM broadcast Station KKSM (priority four). Moreover, petitioner reports that Station KXST(FM) currently provides 70 dBu coverage to both Oceanside and Encinitas from its existing site. Further, petitioner advises that as Oceanside currently receives approximately twenty-four full-time AM and FM broadcast reception services and will continue to do so if its proposal is granted, the community will continue to be well served. Additionally, as no change in the transmitter site for Station KXST(FM) is requested, there will be no gain or loss in coverage or population, and no white or gray areas are involved.

6. In Newnan and Peachtree City, Georgia, 7 FCC Rcd 6307 (1992), the Commission reallocated Channel 244A from Newnan to Peachtree City and modified the license of Station WMKJ(FM) accordingly. Station WMKJ(FM), a "grandfathered" facility under Section 73.213 of the Commission's Rules (pre-1964), did not meet the current spacing requirements set forth in Section 73.207(b) of the Rules. The proposal in Newnan and Peachtree City, supra, did not involve any change in the technical facilities of Station WMKJ(FM). In taking that action, we recognized that we were creating a new short-spaced allotment in contravention of Section 73.207(b) of the Rules. However, our rationale for that action was that "grandfathered" FM stations were in compliance with our Rules when authorized and should be afforded the same opportunity to change their community of license as other stations authorized in conformity with our Rules. In three earlier proceedings, we have requested specific comment on whether this policy should be continued and, if so, whether it should be extended to post-1964 FM stations that are not now in conformity with our current spacing requirements. Our final decision in this proceeding will be subject to the outcomes of those earlier proceeding.

²The allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4) other public interest matters (co-equal weight is given to priorities (2) and (3)).

7. Oceanside and Encinitas are both located in the San Diego Urbanized Area. As Station KXST(FM) currently provides a 70 dBu signal over 57.3% of the urbanized area, and no change in transmitter site is proposed, the proponent's request to change its community of license is not subject to the provision of additional information responsive to a Tuck analysis to show that Encinitas is sufficiently independent of San Diego to merit a first local service preference or whether it should be credited with all of the authorized aural services in the San Diego Urbanized Area.³ See East Los Angeles, Long Beach, and Frazier, California, 10 FCC Rcd 2864 (1995).

8. Channel 271B can be allotted to Encinitas, California, at the petitioner's currently licensed site at coordinates 33-06-40 NL and 117-12-05 WL.⁴ At that site Station KXST(FM) will remain short-spaced to Station KGB-FM, Channel 268B, San Diego, California, at coordinates 32-43-49 NL and 117-05-01 WL, and to Station KSCA(FM), Channel 270B, Glendale, California, at coordinates 34-13-26 NL and 118-03-45 WL.

9. In consideration of the above, as the proposed allotment could provide a first local service to Encinitas without depriving Oceanside of its sole local service, we believe it would serve the public interest to solicit comments on the petitioner's proposal to allot Channel 271B to Encinitas, California. Therefore, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Oceanside and Encinitas, California, as follows:

<u>City</u>	<u>Channel No.</u>	
	<u>Present</u>	<u>Proposed</u>
Encinitas, California	--	271B
Oceanside, California	271B	--

11. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

12. Interested parties may file comments on or before July 6, 1999, and reply comments on or before July 21, 1999, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Federal Communications Commission, Office of the

³See Huntington Broadcasting Co. v. F.C.C., 192 F.2d 33 (D.C. Cir. 1951), RKO General, Inc. ("KFRC"), 5 FCC Rcd 3222 (1990), and Faye and Richard Tuck ("Tuck"), 3 FCC Rcd 5374 (1988).

⁴Although Encinitas is located within 320 kilometers (199 miles) of the common border area between the United States and Mexico, it is not necessary to request Mexican concurrence as no site change for Station KXST(FM) is requested. Rather, the Mexican government will be advised of the change to the Table of Allotments at the conclusion of this proceeding.

Secretary, 445 Twelfth Street, S.W.; TW-A325, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Richard R. Zaragoza, Esq.
Jason S. Roberts, Esq.
Fisher, Wayland, Cooper, Leader & Zaragoza, L.L.P.
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13. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), and 73.606(b) of the Commission's Rules, 46 FR 11549, February 9, 1981.

14. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no ex parte presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An ex parte presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an ex parte presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an ex parte presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Attachment: Appendix

APPENDIX

1. Pursuant to authority contained in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the Notice of Proposed Rule Making to which this Appendix is attached.

2. Showings Required. Comments are invited on the proposal(s) discussed in the Notice of Proposed Rule Making to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. Cut-off Procedures. The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this Notice, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. Comments and Reply Comments; Service. Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the Notice of Proposed Rule Making to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. Number of Copies. In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. Public Inspection of Filings. All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Reference Information Center (Room CY-A257), at its headquarters, 445 Twelfth Street, SW., Washington, D.C.